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In The

Supreme Court of the United States

October Term, 1992

DAVID CALHOUN, CHRISTINE CALHOUN, RONALD DALZELL, PHILIP RINEHARDT, and KEVIN MAY, in Their Individual Capacities,

Petitioners,

vs.

JOSEPH SENK and PATRICIA SENK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether evidence sufficient to create a genuine issue of fact under Rule 56 of the Federal Rules of Civil Procedure in a qualified immunity context includes evidence that is self-contradictory, unspecific, and/or implausible in light of the direct, probative, and admissible evidence of the record taken as a whole.

2. Whether, or to what extent, the principle of qualified immunity in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense" applies to allegations that police officers used excessive force in violation of the Fourth Amendment and 42 U.S.C. § 1983.

3. Whether *Hunter v. Bryant*, 112 S.Ct. 534 (1991), requires the question of the objective reasonableness of individual police officers' use of force to be determined by the court on summary judgment where, considering the genuine, material evidence of record as a whole, the degree of force employed by the officers was reasonable, even if mistaken.

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the caption except Larry Felean, a police officer sued in his individual capacity. The Court of Appeals reversed the District Court's denial of qualified immunity to defendant Felean in his individual capacity.

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David Calhoun, Christine Calhoun, Ronald Dalzell ("Dalzell"), Philip Rinehardt ("Rinehardt"), and Kevin May ("May"), in their individual capacities, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-9a) is not reported. The order of the United States District Court for the Northern District of Ohio, denying petitioners' motion for summary judgment, (App., *infra*, 10a-26a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on April 22, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT OF THE CASE

Respondents filed this action on September 21, 1990 in the United States District Court for the Northern District of Ohio, Eastern Division. In their amended complaint, filed June 20, 1991, respondents alleged, *inter alia*, that petitioners, who are municipal police officers, used excessive and unreasonable force, in violation of the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983, during the arrest of respondent Joseph Senk for domestic violence on May 12, 1990. Jurisdiction was invoked pursuant to 28 U.S.C. § 1343; jurisdiction is also properly predicated upon 28 U.S.C. § 1331. The petitioners filed a motion for summary judgment based upon the federal doctrine of qualified immunity. The District Court denied petitioners' motion for summary judgment, and the Sixth Circuit Court of Appeals affirmed the District Court's denial of qualified immunity to petitioners.[1]

In 1979, respondent Joseph Senk sustained a head injury in a work-related accident. As a result of this injury, Mr. Senk suffers from postconcussion syndrome, which in lay terms is a chemical imbalance in the brain whereby a portion of the brain remains in a concussion, resulting in wide-swinging personality changes and

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[1] The Court of Appeals reversed the District Court's denial of qualified immunity to another police officer, Larry Felean, as to respondents' claim that Officer Felean conducted an unlawful search of respondents' residence. Accordingly, Officer Felean is not a petitioner herein.

explosive personality outbursts. Joseph Senk experienced explosive rages during which he broke furniture and threw things. Joseph Senk testified at his deposition that "after the episode I would not remember; I would be just as much amazed as anybody else like what happened."

Respondent Joseph Senk was first diagnosed as having postconcussion syndrome in 1980 or 1981. Mr. Senk's physicians treated him with various medications for this condition; however, according to Joseph Senk's deposition testimony, his explosive episodes continued even when he was taking his prescribed medication.

Respondent Patricia Senk testified at her deposition that she did not learn until after she married Joseph Senk in 1980 that he suffered from postconcussion syndrome. On December 3, 1982, at 11:24 p.m., Village of Northfield police officers responded to a call from the Senk residence. Mrs. Senk told the officers that Mr. Senk had become very violent, that he had threatened to kill himself in front of Mrs. Senk and their children, and that he had threatened physical harm to her and her children. On August 29, 1985, Mrs. Senk signed a domestic violence complaint alleging that Mr. Senk had assaulted her minor son by repeatedly hitting him and shoving food down his throat; Mrs. Senk further stated that Mr. Senk "has also assaulted me many times before." On March 2, 1987, Mrs. Senk signed another domestic violence complaint, alleging that Mr. Senk "threw Mrs. Senk down, breaking the ribs on her left side." In her deposition, Mrs. Senk explained this episode as follows: "Joe was on some new medication, was doing pretty well, was seeing his doctor and he came home one night and was upset in the kitchen, threw his arms up and he shoved me."

On May 12, 1990, respondent Joseph Senk had another explosive outburst, during part of which he knocked over furniture in his kitchen and attacked respondent Patricia Senk. Mr. Senk's current neurologist, Dr. Brickel, later observed that this incident apparently involved another one of Mr. Senk's episodes of "explosive personality outbursts for which he has no recall", caused by his head injury on the job about ten years earlier. Respondent Patricia Senk testified at her deposition that "I know when Joe is going through a bad episode" and that, just before her husband attacked her on May 12, 1990, "I was trying to control it this time, to find out what was wrong."

It is the police response to respondent Joseph Senk's May 12, 1990 explosive outburst that is the subject of respondents' complaint and amended complaint.

Petitioner Dalzell, a police officer employed by the Village of Northfield, Ohio, was dispatched at the time of the May 12, 1990 incident to respondents' residence in response to a 911 emergency call. Officer Dalzell requested assistance from the Sagamore Hills police department, and petitioner David Calhoun responded to this request.

The two police officers arrived at the respondents' residence at about the same time and observed Patricia Senk sitting in her car. The driver's side window had been broken out and there was glass strewn about inside the vehicle. Joseph Senk told Officer David Calhoun that he and his wife had been fighting and that he had been drinking. Officer David Calhoun smelled alcoholic beverage on Mr. Senk's breath. The officers found that Patricia Senk had red marks on her neck and chin, indicating that she had been grabbed around the neck. Patricia Senk told

the officers that her husband had beaten her in the chest and abdomen, that he had attempted to choke her, and that she was having trouble breathing, had abdominal pains, and could taste blood in her mouth. She told the officers that she was tired of getting beaten up. She warned the officers that Joseph Senk was violent and would attempt to hurt them if placed under arrest.

The officers summoned a rescue squad for Patricia Senk. Meanwhile, Officer David Calhoun had escorted Joseph Senk to his patrol car. While a dispute exists as to whether Joseph Senk was handcuffed at that point, he offered no physical resistance. In addition, a Sagamore Hills police dispatcher sent petitioners Christine Calhoun, Rinehardt, and May to the scene. Patricia Senk requested that her eldest daughter be called to pick up the younger children. Officer David Calhoun entered the Senk residence to make that call. While doing so, he observed that a kitchen cabinet had been tipped over and its contents scattered about the floor.

Officer Dalzell asked Patricia Senk if she wanted to press charges against her husband. She said that she did. Officer Dalzell then went to the patrol car to inform Joseph Senk that he was going to be taken into custody for domestic violence.

Officer Dalzell testified at his deposition that when he went to inform Joseph Senk that he was under arrest for domestic violence, Joseph Senk responded that Officer Dalzell "had better draw [his] [expletive] gun and shoot him, it was the only way [Officer Dalzell] was going to keep [Joseph Senk] from killing [him]." Although Joseph Senk denies making that statement, and claims that he was simply yelling at the officers for entering his house and that Officer Dalzell told him to "shut his [expletive]

mouth", it is undisputed that Joseph Senk was yelling at the officers and that he violently thrashed about and kicked out the side window of the patrol car after his verbal exchange with Officer Dalzell.

Officers Dalzell and David Calhoun testified at their depositions that after Joseph Senk kicked out the patrol car window, he told David Calhoun that he was going to take his weapon and kill him, then reached outside the patrol car and grabbed Officer David Calhoun's gun belt, approximately two to three inches from his weapon, and pulled David Calhoun towards him. David Calhoun unsuccessfully tried to manually free Joseph Senk's grip on his belt by pushing Joseph Senk's arm away. When Joseph Senk would not release his grip on the belt and kept pulling, David Calhoun struck Joseph Senk across the forearm with his flashlight. Only then did Joseph Senk release his grip from the gun belt. David Calhoun then tried to push Joseph Senk back into the vehicle. Joseph Senk grabbed the exterior door handle and tried to open the door to the patrol car. David Calhoun and Dalzell forced the door closed with their bodies. Joseph Senk then grabbed Dalzell's gun belt approximately three to four inches from his weapon, and started to pull him into the patrol car. Dalzell also tried, unsuccessfully, to manually pull away and free himself from Joseph Senk's grip. In fear for his own safety and knowing that Joseph Senk had just tried to take David Calhoun's weapon, but lacking a defensive weapon to use to free himself, Dalzell simply punched Joseph Senk in the face. Joseph Senk then released his grip. Eyewitness Frank Guffin[2], who

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[2] Frank Guffin was named as a defendant in this action on an unrelated count alleging denial of proper medical care to

(Continued on following page)

was standing about fifty feet away, also observed Joseph Senk lunge at and grab onto the waist of one of the officers.

To rebut the aforesaid testimony that Joseph Senk verbally threatened the lives of petitioners David Calhoun and Dalzell and grabbed their gunbelts, the respondents relied upon a portion of the deposition testimony of witness Paul Testa ("Testa"). Mr. Testa confirmed that Joseph Senk did kick out the window of the patrol car and subsequently reached outside the broken window and tried to open the car door. However, Mr. Testa testified on direct examination that he never heard Joseph Senk threaten any police officer and never saw him grab onto any of the petitioners' gunbelts. On cross-examination, Testa explained why he was not able to hear the threats:

> Q. Okay. Now what was Joe [Senk] saying as he was coming out of the police cruiser, window, anything?
>
> A. I don't know. Everybody was saying stuff, you know, and I don't know.
>
> Q. Was he saying anything?
>
> A. I don't know.
>
> Q. Was it loud voices going back and forth?
>
> A. Yes.
>
> Q. A lot of commotion?
>
> A. Yes.

As to Mr. Testa's statement that he did not see Joseph Senk grab the officers' gunbelts, Mr. Testa admitted in his

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respondent Joseph Senk during transit to the hospital. Summary judgment was granted in favor of Mr. Guffin by the district court in a separate order.

deposition that he was not looking at Mr. Senk and the officers at all times during this sequence of events.

Respondents also presented an affidavit from Joseph Senk in which he stated that "at no time . . . did he threaten the life of any police officer, nor did he attempt to gain control of any gun or gun belt, and he did not punch or assault any officer in any manner." Joseph Senk made these assertions notwithstanding his prior testimony that he did not remember his actions after experiencing one of his explosive personality outbursts and notwithstanding that his own treating physician, Dr. Arthur Brickel, had concluded that Joseph Senk's actions on May 12, 1990 were apparently another one of his episodes of "explosive personality outbursts for which he has no recall."

The respondents also contested petitioners' testimony that petitioner David Calhoun struck Joseph Senk on the forearm and wrist with the flashlight, contending that David Calhoun struck Mr. Senk three times in the head with the flashlight. In support of their contentions, the plaintiffs relied upon an additional portion of Testa's deposition in which he states that one of the officers struck Joseph Senk three times on the head with a flashlight. The respondents' contentions that Joseph Senk was struck in the head three times with a flashlight is unsupported by the undisputed medical evidence proffered by the respondents. The medical evidence confirms that Joseph Senk had only a single laceration above his eyebrow that was between an inch and an inch and a half in length. Respondents did not provide the District Court with any medical evidence whatsoever supporting a second or third blow to Joseph Senk's head. Nor is there any

medical evidence that petitioners repeatedly punched Joseph Senk.

The third purported issue of fact related to the reasonableness of the force used by the petitioners. In this regard, the respondents made repeated references to alleged violations of "proper" police conduct or procedure, including "arrest technique and unarmed restraint," "abusive use of handcuffs," and "commonly employed techniques", all of which were to be demonstrated to the jury at trial. The respondents have not presented any evidence as to what these "techniques" and "procedures" were. More importantly, given that qualified immunity was asserted as a defense by the petitioners, the respondents did not present any caselaw that the *particular conduct* (under either the petitioners' *or* the respondents' version of the facts) clearly fell within an area protected by the Constitution, such that a reasonable officer would know that conduct violated the constitutional right.

This failure is perhaps most significant on the issue of whether petitioner Christine Calhoun violated Joseph Senk's rights by her alleged use of a nightstick to restrain him after, according to Testa, Joseph Senk broke the handcuffs that the petitioners were attempting to put on him.

The vast majority of the evidence presented by the respondents related to the conduct of petitioners David Calhoun and Dalzell. In their complaint and amended complaint, the respondents alleged that petitioners May and Rinehardt participated in the alleged beating of Joseph Senk with their nightsticks, flashlights, and fists. In their briefs, however, the respondents presented no evidence detailing May's or Rinehardt's involvement in the alleged beating.

It is upon the basis of these purported genuine issues of material fact that the District Court held that "granting [petitioners] qualified immunity would be inappropriate." Even so, the District Court concluded that the right to be free from excessive force is clearly established. The District Court, however, did not engage in any analysis as to whether, even under the specific circumstances of the *respondents'* version of the facts, the petitioners' conduct rose to such a degree of impropriety that any reasonable officer would have known that what the petitioners did violated Joseph Senk's right to be free from excessive force.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's denial of qualified immunity to petitioners, holding:

> Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of the facts is correct, however, the [petitioners] would clearly not be entitled to qualified immunity. In this case, as in [*Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989)], "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate.

As will be discussed more fully below, the Sixth Circuit's holding and analysis in this case raises important questions regarding federal summary judgment principles and federal qualified immunity principles. The Sixth Circuit opinion did not address the specific arguments in petitioners' appellate briefs that the evidence proffered by respondents to create a genuine issue of material fact was not, as a matter of law, "genuine"

within the meaning of this Court's decisions. Moreover, the Sixth Circuit did not properly apply the qualified immunity principles established by the Court. This case presents significant questions regarding the principles of summary judgment and qualified immunity in the context of claims of excessive force.

ARGUMENT

I. EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF FACT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN A QUALIFIED IMMUNITY CONTEXT DOES NOT INCLUDE EVIDENCE THAT IS SELF-CONTRADICTORY, UNSPECIFIC, AND/OR IMPLAUSIBLE IN LIGHT OF THE DIRECT, PROBATIVE, AND ADMISSIBLE EVIDENCE OF THE RECORD TAKEN AS A WHOLE.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) Rule 56(e) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a *genuine* issue for trial." (Emphasis added.)

The Court has elaborated upon the meaning of the above-quoted provisions of Rule 56 in three recent decisions: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The summary judgment principles set forth in these cases and in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) are directly applicable to the instant case.

The burden on the party moving for summary judgment "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

"By its very terms, [the Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Liberty Lobby*, 477 U.S. at 247-48 (emphasis in original). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. However, "[i]f the evidence is *merely colorable, Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), or is *not significantly probative, Cities Service, supra*, at 290, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (emphasis added). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the

material facts." *Matsushita*, 475 U.S. at 586 (footnote omitted). The "purpose of summary judgment is to 'pierce the pleadings and to *assess the proof* in order to see whether there is a genuine need for trial'. . . . " *Id.* at 587 (emphasis added) (quoting Advisory Committee Note to 1963 Amendment of Fed. R. Civ. P. 56(e), 28 U.S.C. App., p. 626). "Where *the record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* (emphasis added) (quoting *Cities Service*, 391 U.S. at 289).

"It follows from these settled principles that if the *factual context* renders [the plaintiffs'] claims *implausible* – if the claim is one that simply makes *no . . . sense* – [plaintiffs] must come forward with *more persuasive evidence* to support their claims than would otherwise be necessary." *Matsushita*, 475 U.S. at 587 (emphasis added).

A plaintiff cannot rely on "the hope that something can be developed at trial in the way of evidence to support" the allegations of the complaint. *Cities Service*, 391 U.S. at 290. Rather, to prevent summary judgment, the plaintiff must produce "significantly probative" evidence supporting the elements of the claim at the summary judgment stage. *Id.* at 288, 290. Speculation, unreasonable inferences, and implausible factual scenarios are insufficient to defeat summary judgment, particularly when substantial evidence exists to the contrary. *Id.* at 280-90. Evidence produced by the nonmovant that is inconsistent with the nonmovant's theory constitutes especially compelling evidence supporting summary judgment. *Id.* at 277-79, 286.

The lower federal courts have also elaborated upon the concept of what constitutes a "genuine" issue of fact under Rule 56. "A *pretended issue*, one that *no substantial*

evidence can be offered to maintain, is not genuine." *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 362 (5th Cir. 1945) (emphasis added). Moreover, "[e]vidence that is *too incredible to be accepted by reasonable minds* does not raise an issue of credibility to defeat a motion for summary judgment." *Allstate Ins. Co. v. Cannon*, 644 F.Supp. 31, 33, 34 (E.D. Mich. 1986) (emphasis added). *A fortiori*, "[e]ven on a motion for summary judgment, a court is not compelled to give weight to *an allegation that is incontrovertibly demonstrated to be false.*" *United States v. Various Slot Machines*, 658 F.2d 697, 701 (9th Cir. 1981) (emphasis added).

"[T]he nonmovant [may not] rely on deposition statements to the effect that the deponent 'does not remember' a particular fact, as a means of putting that fact in issue." *Carter v. Newsday, Inc.*, 528 F.Supp. 1187, 1191 (E.D.N.Y. 1981); *accord Greensboro Lumber Co. v. Georgia Power Co.*, 643 F.Supp. 1345, 1368 (N.D. Ga. 1986); *Erickson v. Said*, 42 F.R.D. 170, 172-73 (S.D.N.Y. 1967). It is also well-established that "[t]he party opposing summary judgment cannot create a genuine question of fact by *contradicting his prior sworn statement.*" *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987) (emphasis added); *Reisner v. Gen. Motors Corp.*, 671 F.2d 91, 93 (2d Cir.), *cert. denied*, 459 U.S. 858 (1982). This principle applies both to contradictions between a party's deposition testimony and his affidavit, and to contradictions within a party's deposition testimony itself. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). The rule also applies to contradictions in a nonparty witness's testimony, *Martin v. City of New York*, 627 F.Supp. 892, 896 (E.D.N.Y. 1985), and to contradictions between deposition

testimony and the deponent's earlier unsworn memoranda, *Tryco Trucking Co. v. Belk Stores Services, Inc.*, 634 F.Supp. 1327, 1337 (W.D.N.C. 1986). Such self-created issues of fact "are not issues which this Court could reasonably characterize as genuine; rather, they are sham issues which should not subject the defendants to the burden of a trial." *Radobenko*, 520 F.2d at 544. Moreover, blatant contradictions in a witness's testimony justify a conclusion by the court that it "cannot and need not give credence to [that witness's] word as evidence in opposition to [a] motion [for summary judgment]." *CB & F Interamerica, Inc. v. Argo Industrias M & M S.R.L.*, 675 F.Supp. 179, 181 (S.D.N.Y. 1987).

The issues of fact upon which the Court of Appeals relied in the instant case to affirm the denial of petitioners' motion for summary judgment on the ground of qualified immunity are not "genuine" issues of fact under the principles established by the foregoing authorities.

The first such issue is whether respondent Joseph Senk threatened to kill petitioners Dalzell and David Calhoun. Officer Dalzell testified in his deposition that when he went to inform Joseph Senk that he was under arrest for domestic violence, Joseph Senk responded that Officer Dalzell "had better draw [his] [expletive] gun and shoot him, it was the only way [Officer Dalzell] was going to keep [Joseph Senk] from killing [him]." Officers Dalzell and David Calhoun also testified at their depositions that after Joseph Senk kicked out the patrol car window, he told David Calhoun that he was going to take his weapon and kill him.

The Sixth Circuit relied on Mr. Senk's denial that he threatened the officers as well as Paul Testa's testimony that he did not hear any such threat. Mr. Senk's denial

was contained in his affidavit filed after his deposition. The affidavit simply stated that "at no time during his arrest on May 12, 1990, did he threaten the life of any police officer . . . ." As observed above, Mr. Senk made this assertion despite his testimony that he did not remember his actions after experiencing one of his explosive personality outbursts and despite the fact that his own treating physician, Dr. Arthur Brickel, had concluded that Joseph Senk's actions on May 12, 1990 apparently constituted another one of his episodes of "explosive personality outbursts for which he has no recall." "The party opposing summary judgment cannot create a genuine issue of fact by contradicting his prior sworn statement." *Jurado*, 813 F.2d at 1410. As noted above, respondent Patricia Senk also testified that "I know when Joe [Senk] is going through a bad episode" of postconcussion syndrome and that "I was trying to control it this time, to find out what was wrong" just before Mr. Senk attacked her that evening.[4] Therefore, Joseph Senk's purported recollection that he did not threaten any officer is not genuine. "Evidence that is too incredible to be accepted by reasonable minds does not raise an issue of credibility to defeat a motion for summary judgment." *Cannon*, 31 F.Supp. at 33, 34. "[I]f the factual context

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[4] Although Mrs. Senk remembered what happened before she was attacked by her husband, she had no clear recollection of what happened afterward. In particular, she testified that she had no recollection or knowledge of any action of any police officer who arrived at the scene. Accordingly, respondents do not rely on Mrs. Senk as an eyewitness to any of the interactions between the police officers and Mr. Senk.

renders [the respondents'] claims implausible[, respondents] must come forward with more persuasive evidence to support their claims than would otherwise be necessary." *Matsushita*, 475 U.S. at 587.

Respondents would, at first blush, seem to have such "more persuasive evidence" in the testimony of Paul Testa that he did not hear any threats. However, Mr. Testa admitted in his deposition that there were loud voices going back and forth and a lot of commotion at the time; "[e]verybody was saying stuff, you know, and I don't know" what, if anything, Joseph Senk said to the police officers. Accordingly, Paul Testa's testimony on this issue is devoid of probative value.

Because "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial' " on the question as to whether Joseph Senk threatened the lives of the police officers. *Matsushita*, 475 U.S. at 587. Respondents have no "significantly probative evidence", *Liberty Lobby*, 477 U.S. at 249-50, to negate the officers' testimony that respondent Joseph Senk threatened to kill them.

The second issue of fact upon which the Court of Appeals relied was the question of whether Joseph Senk grabbed the officers' gunbelts. Officers Dalzell and David Calhoun testified at their depositions that after Joseph Senk kicked out the car window and told David Calhoun that he was going to take his weapon and kill him, Mr. Senk reached outside the patrol car and grabbed David Calhoun's gunbelt, approximately two to three inches from his weapon, and pulled David Calhoun toward him. After unsuccessfully attempting to push Mr. Senk's arm away, Officer David Calhoun struck Joseph Senk across the forearm with his flashlight. Although this caused Mr.

Senk to lose his grip on David Calhoun's gunbelt, Mr. Senk subsequently grabbed the gunbelt of Officer Dalzell. After unsuccessfully attempting to manually free himself from Mr. Senk's grip, petitioner Dalzell punched Joseph Senk in the face and Mr. Senk then released his grip.

Again, the Sixth Circuit relied on the statement in Mr. Senk's affidavit that "at no time during his arrest on May 12, 1990, . . . did he attempt to gain control of any gun or gun belt" and on Paul Testa's testimony that he did not see Mr. Senk grab an officer's gunbelt. As demonstrated above, Mr. Senk's purported recollection of these events is not genuine since it is totally inconsistent with his pattern of not recalling events that occur during his explosive episodes of postconcussion syndrome. Moreover, Paul Testa's testimony that he did not see Mr. Senk grab an officer's gunbelt does not even contradict the officers' testimony because Mr. Testa was not, by his own admission, looking at the officers and Mr. Senk at all times during these events. The testimony of Mr. Testa, in light of the fact he was not continuously observing the altercation, is in no way inconsistent with the testimony of the officers. Furthermore, the officers' testimony is corroborated by the testimony of eyewitness Frank Guffin, who, from a distance, observed Joseph Senk lunge at and grab the waist of one of the officers. Again, because respondents' evidence is "implausible" and not "significantly probative", it creates no *genuine* issue of fact. *Matsushita*, 475 U.S. at 587; *Liberty Lobby*, 477 U.S. at 249-50; *Cities Service*, 391 U.S. at 280-90. "[T]he record taken as whole", *Matsushita*, 475 U.S. at 587, can lead the rational trier of fact to only one conclusion: Respondent

Joseph Senk did, in fact, grab each of the officers' gunbelts, in succession, after threatening to take their guns and kill them.

The third factual issue upon which the Sixth Circuit relied in denying petitioners' motion for summary judgment is whether Officer David Calhoun struck Joseph Senk on the head three times with a flashlight when the latter had his head out of the window of the police cruiser after he broke the glass in the window and whether the officers beat him with their fists after Joseph Senk was out of the cruiser. The medical evidence supports the officers' testimony that such violence against Mr. Senk did not occur: The medical evidence of record (including the emergency room sheet, the deposition of the emergency room physician, and the deposition of the emergency room nurse) established only that Mr. Senk had a single laceration above his eyebrow; no medical evidence exists of any lacerations, contusions, bruises, or other evidence of beating on any other part of Mr. Senk's head or body. Respondents rely on nonmedical evidence such as inadmissible double hearsay in a Sheriff's report (mischaracterized by respondents as a doctor's report) that "there were bruises across his forehead caused by a superficial trauma", the testimony of Paul Testa that he saw an officer strike Joseph Senk three times on the head with a flashlight, and Patricia Senk's testimony that, for example, when she visited her husband at the hospital "I ran my fingers through his hair and he was totally a mess of cuts and lumps." However, it is "implausible", *Matsushita*, 475 U.S. at 587, that Mr. Senk's attending emergency room physician and nurse would have missed such injuries, if the injuries had in fact existed, in their observations and reports. "Even on a motion for summary

judgment, a court is not compelled to give weight to an allegation that is incontrovertibly demonstrated to be false." *Various Slot Machines*, 658 F.2d at 701.

The Court of Appeals also relied on the testimony of Paul Testa and Michael Lucas, another witness, regarding the alleged actions of Officer Christine Calhoun. Although petitioner Christine Calhoun denies the truth of much of this testimony, the factual dispute as to her actions is not material. For even Paul Testa admits that at the time of Officer Christine Calhoun's actions "[s]he hollered something like he broke the handcuffs or something or broke the cuffs . . . ." The Court of Appeals ignored this critical fact, which was brought to its attention in petitioners' appellate briefs and the references therein to the evidence of record.

Therefore, the Sixth Circuit rested its denial of summary judgment to petitioners on evidence that was legally insufficient to create a genuine issue of material fact. The Court of Appeals did not address the arguments in petitioners' appellate briefs that the evidence in question failed to create a *genuine* issue of fact when analyzed from the perspective of the decisions of this Court and other federal courts on summary judgment principles. The refusal of the Sixth Circuit to address the question of the *genuineness* of the factual issues is especially disturbing in the context of a motion for summary judgment based on qualified immunity, for this Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage of litigation." *Hunter v. Bryant*, 112 S.Ct. 534, 536 (1991). "Immunity ordinarily should be decided by the court long before trial." *Id.* at 537. The Sixth Circuit's refusal to address the precise issue of the genuineness of the factual issues in a

qualified immunity appeal is in direct conflict with the decisions of this Court and of the courts in other circuits on the principles of summary judgment and qualified immunity. Accordingly, it is important that the Court grant certiorari to resolve this conflict.

II. THE PRINCIPLE OF QUALIFIED IMMUNITY IN *ANDERSON V. CREIGHTON*, 483 U.S. 635, 640 (1987), THAT "THE RIGHT THE OFFICIAL IS ALLEGED TO HAVE VIOLATED MUST HAVE BEEN 'CLEARLY ESTABLISHED' IN A MORE PARTICULARIZED, AND HENCE MORE RELEVANT, SENSE" APPLIES TO ALLEGATIONS THAT POLICE OFFICERS USED EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT AND 42 U.S.C. § 1983.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court summarized the basic qualified immunity standard set forth in its prior caselaw by stating that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (citations omitted). The Court's analysis in *Creighton* elaborated upon this test as follows:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (*no matter how unclear it may be that the particular action is a violation*) violates a clearly established right. Much the same could be said of any other

> constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. . . . [O]ur cases establish that *the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that *in light of pre-existing law the unlawfulness must be apparent.*

Creighton, 483 U.S. at 639-40 (emphasis added) (citations omitted).

In *Creighton*, the Court held that the Eighth Circuit misapplied the foregoing principles:

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we

> have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. The same is true of their conclusions regarding exigent circumstances.

Id. at 640-41 (emphasis in original) (citation omitted).

Thus, qualified immunity analysis "will often require examination of the information possessed by the . . . officials." *Creighton*, 483 U.S. at 641. "The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the actions of the defendant officers] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Id.*

Like the Eighth Circuit's opinion in *Creighton*, the Sixth Circuit's analysis of "clearly established law" in the present case was merely a brief discussion of general principles. (App., *infra*, 7a-8a). The Court of Appeals cited no Supreme Court decisions on excessive force. The Sixth Circuit cases on excessive force cited by the Court of Appeals all involved police *shootings*, and only one of these cases predated the events of May 12, 1990. The respondents in this case have *never* claimed that the police officers *shot* anyone. The Sixth Circuit cited no Supreme Court or Sixth Circuit cases on excessive force even generally analogous to the fact situation in the instant case. Although the Sixth Circuit cited authority from another circuit as to the liability of petitioners Rinehardt and May, *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986), that case was based on the substantive due process approach to excessive force liability expressly rejected by this Court in *Graham v. Connor*, 490

U.S. 386, 392-95 (1989). Moreover, a Ninth Circuit case can hardly constitute "clearly established law" for police officers in the Sixth Circuit. The Court of Appeals cited no other cases on excessive force. Therefore, as a matter of definition, the Sixth Circuit's opinion itself demonstrates an absence of "clearly established law" on the applicability of the Fourth Amendment to fact situations analogous to that of the case at bar. This conclusion necessarily follows even if one accepts – despite the lack of "significantly probative evidence" of record – respondents' version of the facts.

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Court held that "[a] police officer may not seize an unarmed, *nondangerous* suspect *by shooting him dead*." (Emphasis added.) It is undisputed in the case at bar that respondent Joseph Senk had already physically attacked his wife, had destroyed property, and was acting in a bizarre manner when the police officers – who were aware of these events and had observed some of them firsthand – took action to restrain him. Accordingly, it cannot be said that no reasonable police officer in the positions of petitioners would have concluded that Joseph Senk was dangerous.[5]

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[5] "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12 (emphasis added).

Moreover, it is undisputed that no petitioner used a gun or knife against Joseph Senk. Therefore, *Tennessee v. Garner* does *not* constitute "clearly established law" supporting any theory that petitioners used constitutionally excessive force against respondent Senk.

In *Graham, supra,* the Court considered the general test for a claim that a police officer used constitutionally excessive force. "Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham,* 490 U.S. at 394. In *Graham,* the Court analyzed the Fourth Amendment reasonableness test as follows:

> Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. . . . Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," . . . , however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime, *whether the suspect poses an immediate threat to the safety of the officers or others,* and whether he is *actively resisting arrest or attempting to evade arrest by flight.* See *Tennessee v. Garner,* 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

Graham, 490 U.S. at 396 (emphasis added).

"The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The Court elaborated upon this principle as follows:

> With respect to a claim of excessive force, the . . . *standard of reasonableness at the moment* applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," . . . violates the Fourth Amendment. *The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.*
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 396-97 (emphasis added).

In *Graham*, the Court expressed no view on the proper application of qualified immunity to excessive force cases because no claim of qualified immunity had been raised in that case. *Id.* at 399 n.12. The instant case provides the Court with an opportunity to address the legal issue that it necessarily reserved in *Graham* and which it has not addressed in any other decision: Does the principle of qualified immunity in *Anderson v. Creighton*, 483 U.S. at 640, that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant,

sense", apply to allegations that police officers used excessive force in violation of the Fourth Amendment and 42 U.S.C. § 1983?

Furthermore, two circuits have expressed doubt that qualified immunity even applies in excessive force cases. *Hunter v. District of Columbia*, 943 F.2d 69, 77 (D.C. Cir. 1991) ("We too doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham [v. Connor]*"); *Street v. Parham*, 929 F.2d 537, 539 n.1 (10th Cir. 1991). It is important for the Court to clarify whether the doctrine of federal qualified immunity applies to excessive force cases and, if so, whether excessive force cases require different qualified immunity principles from those set forth in *Creighton*.

III. *HUNTER V. BRYANT*, 112 S.CT. 534 (1991), REQUIRES THE QUESTION OF THE OBJECTIVE REASONABLENESS OF INDIVIDUAL POLICE OFFICERS' USE OF FORCE TO BE DETERMINED BY THE COURT ON SUMMARY JUDGMENT WHERE, CONSIDERING THE GENUINE, MATERIAL EVIDENCE OF RECORD AS A WHOLE, THE DEGREE OF FORCE EMPLOYED BY THE OFFICERS WAS REASONABLE, EVEN IF MISTAKEN.

In its recent decision in *Hunter v. Bryant, supra*, this Court reversed the Ninth Circuit's affirmance of a denial of a motion of certain Secret Service agents for summary judgment on the ground of qualified immunity. This Court held that "[t]he decision of the Ninth Circuit ignores the import" of the Court's earlier decisions on qualified immunity:

> The Court of Appeals' confusion is evident from its statement that "[w]hether a reasonable officer could have believed he had

> probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach." 903 F.2d, at 721. This statement of law is wrong for two reasons. First, *it routinely places the question of qualified immunity in the hands of the jury. Immunity should ordinarily be decided by the court long before trial. . . .* Second, *the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.*

112 S.Ct. at 536-37 (emphasis added).

The Court held that the agents were entitled to qualified immunity: "Even if we assumed, *arguendo*, that they . . . erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity *because their decision was reasonable, even if mistaken.*" 112 S.Ct. at 537 (emphasis added). Similarly, the Court held in *Malley v. Briggs*, 475 U.S. 335, 341 (1986) that "if officers of reasonable competence could disagree on [the] issue, immunity should be recognized."

As demonstrated in Part I of the "Argument", *supra*, respondents lack significantly probative evidence to create a genuine issue of fact as to whether the petitioners committed the types of acts alleged by respondents. Moreover, as demonstrated in Part II of the "Argument", even assuming, *arguendo*, that genuine issues existed as to these factual matters, petitioners would nevertheless be entitled to qualified immunity because no clearly established law at the time of the events had defined such conduct as violative of the Fourth Amendment. The

Court's decisions in *Hunter v. Bryant* and *Malley v. Briggs* underline the significance of these qualified immunity principles and re-emphasize the importance, in a qualified immunity context, of a strict examination of whether the purported factual issues are indeed "genuine" within the meaning of this Court's decisions on summary judgment. Moreover, *Hunter* emphasizes the principle that the court, not the jury, decides the question of objective reasonableness. The present case offers the Court an opportunity to elaborate upon and apply its qualified immunity and summary judgment principles in the context of excessive force claims. As observed above, the circuits are in a state of confusion and disagreement regarding the application of these principles to excessive force cases. Clarification from this Court is needed to resolve these conflicts.

In addition or in the alternative, the Court might take the approach set forth in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991) that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." It is the position of petitioners that, even apart from qualified immunity, respondents cannot establish – under either respondents' or petitioners' versions of the facts – a constitutional violation. This inquiry involves the applicability of *Graham* to issues not reached in that case. For example, once it is appropriate, under the principles recognized in this Court's cases, for a police officer to use force, to what extent should the courts make fine distinctions about the degree of force employed when "allow[ing] for the fact that police officers are often

forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving . . . ."? *Graham*, 490 U.S. at 397. In addition, the facts and the approaches of the lower courts in the instant case give rise to the question whether the tort principle that the defendant takes the plaintiff as he finds him is applicable in a constitutional context. The respondents have attempted to establish the degree of force used in this matter by the results to a person who already had serious brain injury. In this manner, the question arises whether the factor of "the extent of the injury inflicted" in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) has been improperly introduced in this case in light of the Court's rejection of the *Johnson v. Glick* analysis in *Graham*.

CONCLUSION

As explained above, this case presents many significant questions for the Court's consideration, including some issues involving conflicts between the circuits. Therefore, petitioners request that the Court issue a writ of certiorari to the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

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APPENDIX

NO. 91-3823

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH E. SENK, et al., Plaintiffs-Appellees, v. VILLAGE OF NORTHFIELD, et al., Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

Decided and Filed *[April 22, 1992]*

BEFORE: **GUY** and **NELSON**, Circuit Judges, and **REAVLEY**, Senior Judge.*

PER CURIAM. This is a civil rights action that was brought in federal court by a husband and wife who alleged, among other things, that excessive force was used in arresting the husband after his participation in a violent domestic altercation. The plaintiffs also claimed that their constitutional rights were violated by a search

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*The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

of their house conducted by one of the defendants after the arrest.

Asserting qualified immunity, six defendants, all of them police officers, moved for summary judgment. The district court denied the motion, and the officers perfected a timely interlocutory appeal. The principal question on appeal is whether the court erred in concluding that there were genuine issues of material fact that precluded summary disposition of the claims against the officers.

Concluding that the district court was correct, in the main, we shall affirm the denial of summary judgment as to the officers (five in number) who are alleged to have used excessive force. We believe that the officer who conducted the challenged search was entitled to qualified immunity, however, and we shall direct that judgment be entered in his favor on remand.

I

Plaintiff Joseph Senk, who is said to have suffered from post-concussion syndrome, had an explosive outburst in which he trashed his kitchen and attacked his wife. Defendant Ronald Dalzell, a police officer employed by the Village of Northfield, Ohio, was dispatched to the Senk residence in response to a 911 telephone call. Officer Dalzell requested assistance from the Sagamore Hills police department, and Officer David Calhoun, another defendant, responded to this request.

The two policemen arrived at the Senk residence at about the same time. Mr. Senk told Officer Calhoun that

he and his wife had been fighting and that he had been drinking. The officers found that Mrs. Senk had red marks on her neck and chin, indicating that she had been grabbed around the neck. Mrs. Senk told the officers that her husband had beaten her in the chest and abdomen, that he had attempted to choke her, and that she was having trouble breathing, had abdominal pains, and could taste blood in her mouth. She allegedly warned the officers that Mr. Senk was violent and would attempt to hurt them if placed under arrest.

The officers summoned a rescue squad for Mrs. Senk, and Officer Calhoun escorted Mr. Senk to a patrol car. The parties disagree as to whether Mr. Senk was handcuffed at this time, but it is undisputed that he offered no resistance. Meanwhile, a Sagamore Hills police dispatcher sent Officers Christine Calhoun (the wife of David Calhoun), Philip Rinehardt, and Kevin May to the scene. These individuals too have been named as defendants.

Mrs. Senk says that she asked an emergency medical technician to call her oldest daughter and tell the daughter to pick up two other children. The technician was given permission to use the telephone in the house for that purpose, according to Mrs. Senk, but the officers say that she gave them permission to enter the house. Both sides agree that Officer David Calhoun and Officer Dalzell entered the Senk residence to make the call. Inside, Calhoun observed that a kitchen cabinet had been tipped over and its contents scattered about the floor.

Officer Dalzell asked Mrs. Senk if she wanted to press charges against her husband. She said she did. Officer Dalzell then went to the patrol car to inform Mr.

Senk that he was going to be taken into custody for domestic violence. Officers Christine Calhoun, Rinehardt, and May arrived shortly thereafter.

The parties' accounts of what happened next differ sharply. Officer Dalzell says that when he informed Mr. Senk, who was still sitting in the police car, that he was under arrest for domestic violence, Senk responded that "I had better draw my fucking gun and shoot him, it was the only way I was going to stop him from killing me." The Senks' version is that Mr. Senk was screaming at the officers for entering his house, and Officer Dalzell stuck his head inside the front door of the cruiser to tell him to "shut his fucking mouth." Whatever may have been said, both sides agree that Mr. Senk kicked out the side window of the police car after the exchange with Officer Dalzell.

Officers Dalzell and David Calhoun say that Mr. Senk then reached out of the broken window and threatened to take Officer Calhoun's gun and shoot him. Mr. Senk allegedly grabbed the officer's gun belt. Officer Calhoun says he responded by striking Mr. Senk across the forearm with his flashlight, causing him to release his grip on the gun belt, and pushed him back into the vehicle. Mr. Senk then allegedly grabbed Officer Dalzell's gunbelt, and Dalzell freed himself by punching Mr. Senk in the face.

Mr. Senk attempted to force his way through the broken window at this point, according to Officer Calhoun. All of the officers then on the scene attempted to push him back into the car, but they could not do so. The officers say that they tried unsuccessfully to handcuff Mr.

Senk as he was coming out the window, and Mr. Senk fell out the window face-first onto the ground. Once outside the car, Mr. Senk kicked and thrashed about until he was subdued.

Mr. Senk, for his part, denies that he threatened the life of any officer, or grabbed an officer's gun belt, or assaulted an officer. He points to deposition testimony given by a neighbor, Paul Testa, who said that after Mr. Senk kicked out the car window, Officer David Calhoun yelled "Goddamn it Joe, you really fucked up now, this is a brand new cruiser." Mr. Testa testified that Officer Calhoun immediately struck Mr. Senk on the head three times in rapid succession "with a big damn flashlight." Mr. Testa said he did not hear Mr. Senk threaten to kill a police officer and did not see Mr. Senk try to grab an officer's gun or gun belt. He did see Mr. Senk reach his hands out the window, but his impression was that Mr. Senk was merely trying to protect himself from Officer Calhoun.

Mr. Testa recalls that one of the officers then opened the car door, and Mr. Senk, dazed, stepped out. As he stood on the ground, all of the officers who were on the scene began to beat him with their fists. The officers then "literally kicked [Senk's] feet out from underneath him." At this point, with Mr. Senk handcuffed and on the ground, Officer Christine Calhoun, who weighed about 200 pounds, leaped on him. According to Michael Lucas, another witness, Mrs. Calhoun "was either bouncing on him or applying some type of pressure to him that seemed unnecessary." Lucas said she had Senk by the throat, and Testa said that her nightstick was pressed against his throat, choking him.

Mr. Senk was taken to a hospital by ambulance. He suffered a respiratory arrest and allegedly lay in a coma for five weeks. He had trauma to the head, a dislocated elbow, and multiple bruises and lacerations to the head, face, and arms. It is alleged that he lost his sight and suffered brain damage as a result of the beating by the police.

Defendant Larry Felean, another policeman, arrived at the scene shortly after Mr. Senk was finally restrained. Officer Dalzell told Felean that there had been domestic violence at the Senk house and asked him to go back to the police station, get a camera, and take pictures of the inside of the residence. Officer Felean did so, and also examined some papers inside the house.

The Senks brought suit under 42 U.S.C. § 1983 against the Village of Northfield, the Township of Sagamore Hills, the individual police officers, and three emergency medical technicians. Asserting qualified immunity defenses, the police officers moved for summary judgment. The district court denied the motion, and this appeal followed.

II

The defendants contend that Mr. Senk posed an immediate threat to the safety of the officers, that they used only moderate force against him, and that their behavior was objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Given the sharp conflict in the evidence, only a jury can decide whether the facts are as the officers say they are.

In *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), we held that the standard for determining qualified immunity in excessive force cases is the general standard set out in *Anderson v. Creighton*, 483 U.S. 635 (1987): "whether an objectively reasonable officer" would believe that the conduct in question was lawful. *Yates*, 941 F.2d at 445-47. If the level of force used by the officers was necessary to remove a threat to their safety, for example, or was necessary to avoid the use of lethal force, a grant of qualified immunity would be appropriate. See *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989). Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of the facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity. In this case, as in *Brandenburg*, 882 F.2d at 216, "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate. *Yates*, 941 F.2d at 447.

It is contended on behalf of Officers May and Rinehardt that they are entitled to summary judgment because the Senks' brief opposing the summary judgment motion presented no specifics detailing their participation in the alleged beating. Witness Lucas stated that five or six officers wrestled Mr. Senk to the ground, however, and that there were at least five officers on top of Mr. Senk when Christine Calhoun choked him. Only five officers were present at the time, and Officers May and Rinehardt were among that number; Mr. Lucas' statement

thus raises an issue of fact as to whether they participated in illegal conduct. See *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986).

It is contended on behalf of Officer Christine Calhoun that there was no evidence that she used unreasonable force in employing her nightstick to restrain Mr. Senk. The testimony given by Mr. Testa could well support the plaintiffs' claim, however, and the statement of Mr. Lucas seems clearly to do so. Summary judgment would not be appropriate for this defendant.

III

As to the contention that Officer Felean conducted an unconstitutional serch [sic] of the Senks' house, it is undisputed that no search warrant was obtained. Officer Felean testified, however, that he operated under the assumption that Officer Dalzell, his senior officer, had obtained Mrs. Senk's consent to the search. Such an assumption was objectively reasonable, in our opinion.

Mrs. Senk had unquestionably been the victim of a serious assault by her husband, and she had agreed to press criminal charges against him. Officer Felean was told by his superior that violence had taken place inside the house and that he should take pictures for evidentiary purposes. He had no reason at all to suppose that Mrs. Senk had not agreed to the gathering of evidence to support the charges she said she wanted to bring. On remand, therefore, summary judgment should be entered in favor of Officer Felean.

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for further proceedings not inconsistent with this opinion.

REAVLEY, Circuit Judge, Concurring in part and Dissenting in part.

I would affirm the judgment of the district court. Without consent to search, a fact issue about which there is a square conflict, the officers had no right to search. It would be the same if Officer Dalzell erroneously told Officer Felean that a warrant had been issued.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH E. SENK, et al. Plaintiff – vs – VILLAGE OF NORTHFIELD, et al. Defendant	)	CASE NO. 90-CV-1699 Judge Sam H. Bell ORDER

Currently pending before the court in the above-captioned matter is a motion for summary judgment filed pursuant to Fed. R. Civ. P. 56 by defendants David Calhoun, Christine Calhoun, Kevin May, Philip Richard, Ronald Dalzell, and Larry Felean in their individual capacities. The underlying complaint alleges a cause of action under 42 U.S.C. §1983 against ten defendants, as follows: excessive and unnecessary force on the part of D. Calhoun, C. Calhoun, May, Rienhardt, and Dalzell in their official and individual capacities (Count I); failure to provide adequate medical assistance as to paramedics Frank Guffin and Kenneth Guffin in their official and individual capacities (Count II); unlawful search on the part of Felean in his official and individual capacities (Count III); failure to train and supervise on the part of the municipal defendants, the Village of Northfield and the Township of Sagamore Hills, along with Frank Guffin (Count IV); and punitive damages as to all defendants (Count V). In addition, the complaint alleges pendent state law claims of intentional infliction of emotional distress (Count VI) and loss of consortium (Count VII). Plaintiffs Joseph E. and Patricia A. Senk seek monetary

and punitive damages "in an amount that will fully and fairly compensate them," attorney's fees, and costs.

The motion for summary judgment filed on behalf of police defendants D. Calhoun, C. Calhoun, May, Rienhardt, Dalzell, and Feleppa raises the defense of qualified immunity as to Counts II and III of the complaint. Plaintiffs oppose this motion, arguing that genuine issues of material fact exist which preclude the granting of the police defendants' motion for summary judgment.

I. BACKGROUND

The factual scenario which led to the filing of the complaint stems from an assault allegedly imposed upon J. Senk by defendants D. Calhoun, C. Calhoun, Rienhardt, May, and Dalzell. On or about May 12, 1990, plaintiffs Joseph and Patricia Senk were engaged in a marital dispute at their residence. Responding to a telephone call, the five defendant police officers, comprised of members from both the Northfield and Sagamore Hills police departments, arrived at plaintiffs' residence and arrested Joseph Senk. During Senk's arrest, the five officers allegedly inflicted a severe beating upon Mr. Senk which subsequently led to alleged severe injuries. There are radically opposed versions of the scuffle between J. Senk and defendants, depending on which version one follows.

According to the testimony of the police defendants, any force utilized in subduing Senk was necessary due to Senk's threatening and resistant behavior. Initially, everyone is in agreement that plaintiff was calm when the officers arrived, offering no resistance when led inside

the police cruiser. While plaintiff was sitting in the rear of the cruiser, Dalzell informed him he was under arrest for domestic violence (Dalzell Deposition at 49). At this point, according to Dalzell, Senk asked Dalzell "how bad I wanted to kill him" and that Senk "told me I had better draw my (expletive) gun and shoot him, it was the only way I was going to stop him from killing me." (*id.* at 51). After this, Dalzell states that plaintiff reached out of the broken window and told D. Calhoun that he (Senk) would take his (D. Calhoun's) gun and shoot him (Dalzell at 54, D. Calhoun Deposition at 59, 61).

According to both Dalzell and D. Calhoun, Senk then grabbed D. Calhoun's gun belt approximately six inches from the gun itself, although both admit he never actually touched the gun itself (Dalzell at 57-58); D. Calhoun at 63, 65). Dalzell also states that Senk grabbed his gun belt (Dalzell at 61). D. Calhoun then struck plaintiff across the forearm with his flashlight (D. Calhoun at 66), but testifies that at no time did he strike him on the head (*id.* at 67).

According to D. Calhoun, Mr. Senk then attempted to force his way through the broken window (D. Calhoun at 68). The officers attempted to push him back into the car, but plaintiff somehow wriggled free (*id.* at 69-71). The officers tried to handcuff Senk as he was coming out the window, but were unsuccessful (*id.* at 75). Plaintiff's body went straight from the window of the cruiser to the ground when he came out of the cruiser's window (*id.* at 74). After this, Senk kicked and thrashed for a brief period of time, but was eventually subdued. According to Dalzell, Senk never actually hit any of the officers during this time (Dalzell at 77).

In plaintiffs' brief in opposition to the motion for summary judgment, a completely different version of the facts is set forth. First, in an affidavit, Mr. Senk testifies that he never threatened the life of any officer, never grabbed an officer's gun belt, and never assaulted an officer on the night of his arrest. The deposition testimony of an eyewitness, Paul Testa, supports this version. According to Testa, while plaintiff was sitting in the cruiser, D. Calhoun reached in and struck Senk on the head with a flashlight three times (Testa Deposition at 10; *see also* J. Senk Deposition at 63, 145). At no time did Senk ever strike an officer, because his arms were never free (Testa at 15). Most importantly, Testa's statements indicate that plaintiff never grabbed an officer's gun belt or threatened any of them:

> Q. Okay. At any time at all during your observation that evening, did you see Joe grab or attempt to grab anyone by the throat for example?
>
> A. No.
>
> Q. At any time during that evening, did you see Joe attempt to grab any police officer's gun or gun belt?
>
> A. No, no, no.
>
> Q. Did you at any time hear Joe Senk threaten to kill one of the police officers?
>
> A. No.

Testa at 16. Testa, in fact, believed that, rather than resisting, Senk was only attempting to defend himself from the policemen (Testa at 77). Even one of the defendants,

Rienhardt, does not recall ever seeing plaintiff grab an officer's gun belt or strike an officer (Rienhardt at 47-48).

After Senk had exited the cruiser, Testa recalls, the officers commenced beating him with their fists while he was standing (Testa at 82). It should be recalled that, according to D. Calhoun, J. Senk was never standing during this period, but went straight from the window to the ground). The officers then "literally kicked [Senk's] feet out from underneath him" (Testa at 16-17, 82), at which point Senk dropped and "hit the concrete" on "his tail end, on his backside" (*id.*).

At this point, according to Testa, C. Calhoun, weighing 200-220 pounds (Michael Lucas, eyewitness, Deposition at 8), leaped on Senk (Testa at 17) while he was on the ground, handcuffed. According to Lucas, C. Calhoun was "bouncing" on Senk's chest with her knee and choking him with her nightstick.

> Q. Getting back to the lady police officer, and you emphasized the fact that she had a knee on his chest and choking him with something, and you just indicated to me additionally that she was bouncing on his chest?
>
> A. Yes, she was coming up off the ground and coming back down on top of his chest, because like I said, his back or his side was on the ground. He was not face to the ground, his back was down there, and it seemed like she was either bouncing on him or applying some type of pressure to him that seemed unnecessary. Like I said, he was already on the ground being subdued.

Q. And she also had him by the throat?

A. She had him right there without a doubt.

Lucas at 10. Lucas also stated that the officers were being "extremely rough" with Mr. Senk (Lucas at 9-10).

Subsequent to these events, plaintiff was taken to the hospital in an ambulance, suffered respiratory arrest, and allegedly lay in a coma for five weeks.

With regard to the fourth amendment claim against Felean, the evidence indicates that Mrs. P. Senk may have given consent to one of the officers, D. Calhoun, to enter the Senks' residence in order to telephone her daughter (D. Calhoun at 48). However, P. Senk denies having given such consent to any police officer, claiming that she only gave such consent to a paramedic (P. Senk at 121). While in the house, D. Calhoun noticed damage which had, apparently, resulted from the incident of domestic violence between plaintiffs (*id.* at 49-50). D. Calhoun was in the house for approximately "a minute, maybe less" while telephoning P. Senk's daughter (*id.* at 52).

Felean arrived upon the scene approximately forty-five minutes later. At that time, defendant Dalzell instructed Felean to obtain a camera from the police station and then return and take pictures of the inside of the residence (Felean at 74-75). Felean did as instructed, and took several snapshots of the inside of plaintiff's home.

It is undisputed that neither Felean nor any of the other officers obtained a search warrant, and also that Felean never sought to obtain a warrant (Felean at 92). Felean, however, later testified that he was under the

assumption that Dalzell, his senior officer (*id.* at 75), had obtained consent from Mrs. Senk to take the pictures; thus, he believed the entry into the residence was lawful (*id* at 76, 95). Felean also testified that neither Dalzell nor anyone else had informed him that such consent had ever actually been given (*id.*) He also testified that he had no reason to believe that the evidence of domestic violence within the residence would disappear at any time soon (*id.* at 102).

II. ANALYSIS

In reviewing a motion for summary judgment, a court must consider the pleadings, related documents, evidence, and all reasonable inferences in a manner most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 86 L.Ed.2d 142 (1970); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). Rule 56 provides, in relevant part, as follows:

> (c) . . .
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> . . .
>
> (e) . . .
>
> When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Three Supreme Court cases have provided guidance as to the nature of the respective burdens allocated under Rule 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The ultimate burden lies with the non-moving party to show the existence of a genuine issue of material fact. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' Fed. Rule Civ. Proc. 56(e)." *Matsushita*, 475 U.S. at 586-587 (emphasis supplied). "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The court in *Anderson* held that "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff had had a

full opportunity to conduct discovery." *Anderson*, 477 U.S. at 257.

On the other hand, the moving party's burden under Rule 56 is lighter.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c) . . . suggests the absence of such a requirement.

Celotex, supra, at 323 (emphasis supplied).

The Sixth Circuit Court of Appeals, in *Street v. J. C. Bradford and Co.*, 886 F.2d 1472 (6th Cir. 1989) recently reviewed court decisions and commentary regarding the impact of *Anderson*, *Celotex*, and *Matsushita* on summary judgment practice. The court concluded that a "new era" in summary judgment practice has opened in the court system as a result of these opinions.

> Scholars and courts are in agreement that a "new era" in summary judgments dawned by virtue of the Court's opinions in these cases . . . On the whole, these decisions reflect a salutary return to the original purpose of summary judgments. Over the years, decisions requiring denial of summary judgment if there

> was even a suggestion of an issue of fact and [sic] tended to emasculate summary judgment as an effective procedural device.

Street, supra, at 1476.

The court enunciated the following "new era" principles, among others: as on federal directed verdict motions, the "scintilla" rule applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion; the respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment"; the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. *Id.* at 1479-1480 (footnotes and citations omitted). With these standards in mind, the court will now examine defendants' arguments in order to ascertain whether judgment in their favor as a matter of law is appropriate in this case.

Defendants D. Calhoun, C. Calhoun, Dalzell, Rienhardt, and May argue that the defense of qualified immunity shields them from liability in this case. The standard for deciding the issue of qualified immunity was set forth in *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). For a thorough discussion of the qualified immunity standard as set forth in *Anderson* and its progeny, *see* this court's companion order regarding the defense as asserted by defendants Frank Guffin and Kenneth Guffin. The court will proceed to apply this standard to the facts herein.

This court's initial inquiry under the qualified immunity doctrine is to determine whether the right alleged to have been violated was clearly established at the time of the five officers' actions. In their motion for summary judgment, defendants do not contend that one's right to be free from the use of excessive government force under the fourteenth and fourth amendments was not clearly established on the evening in question. In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court made this clear and also set forth the standard under which to analyze a §1983 claim based upon an excessive force theory. It is this standard under which this court will determine whether defendants have met the second part of the qualified immunity standard, *viz.*, whether the record contains evidence that defendants' conduct rose to such a degree that the reasonable official would have known that what defendants were doing violated J. Senk's clearly established right to be free from the use of excessive force.

In *Graham*, the plaintiff was a diabetic who felt the onset of an insulin reaction and desired to purchase orange juice at a convenience store. Upon seeing a long line at the checkout counter, the plaintiff hurriedly exited, got into a friend's automobile, and instructed the friend to drive to another friend's house. One of the defendants, a police officer, became suspicious of the hurried exit and so stopped the automobile. Backup units arrived, and the officers were told by the friend of the plaintiff's condition. Nonetheless, they handcuffed plaintiff, shoved him face-first into the hood of the automobile, and threw him head-first into the car.

Plaintiff brought suit pursuant to 42 U.S.C. §1983, but the district court granted the defendant's motion for directed verdict, finding that the officers' excessive use of force did not give rise to a cause of action under §1983. The district court relied on a substantive due process test, reasoning that the application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 38 L.Ed.2d 324, 94 S.Ct. 462. The due process test, with which the Fourth Circuit Court of Appeals agreed on appeal, is a balancing test and focuses on the need for the application of force, the relationship between that need and the amount of force used, the extent of the injury inflicted, and whether the force was applied maliciously to cause harm or in a good faith effort to maintain order.

The Supreme Court in *Graham* rejected the due process test in an excessive force context under §1983. The Court stated that where the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as a claim invoking the protections of the fourth amendment and its unreasonable search and seizure clause. *Id.*, 490 U.S. at 394. The Court concluded that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*, 490 U.S. at 395 (emphasis in original).

Determining the reasonableness of a particular use of force requires an investigation into the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*, 490 U.S. at 396. In short, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*, 490 U.S. at 397. These standards have been utilized by numerous courts following *Graham* in a variety of excessive force contexts. *See Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir. 1990); *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1990); *Hay v. City of Irving, Texas*, 893 F.2d 796 (5th Cir. 1990); *Hamm v. Powell*, 893 F.2d 293 (11th Cir. 1990); *Hammer v. Gross*, 884 F.2d 1200 (9th Cir. 1989); *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Calamia v. City of New York*, 879 F.2d 1025 (2d Cir. 1989).

Applying the standard set forth in *Graham* to the facts of this case, it is clear that the conflicting version of facts creates an issue for the jury as to whether the conduct of the five officers in arresting J. Senk was objectively reasonable. It follows from this, of course, that whether the officers should have known that what they were doing violated plaintiff's right to be free from the use of excessive force cannot be judicially determined at this time. Thus, granting these defendants qualified immunity would be inappropriate. While it is undisputed that Mr. Senk kicked out the police cruiser's window, plaintiffs'

version of the facts discussed above establishes that the [sic] was struck in the head with a flashlight three times and was beaten by the officers while already handcuffed and subdued. Most importantly for purposes of the *Graham* analysis, plaintiff's version of the facts creates a jury question as to whether J. Senk "posed an immediate threat to the safety of the officer's [sic] or others," and whether he was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Simply put, there exists evidence in the record which creates jury questions as to the essential elements of plaintiffs' claims and which preclude the defendants' utilization of the protections afforded by the qualified immunity doctrine.

With regard to the fourth amendment unreasonable search claim, defendant Felean's argument is threefold. First, Felean contends that Mr. Senk's subsequent guilty plea to the charge of domestic violence in state criminal proceedings collaterally estops plaintiffs' ability to challenge the legality of Felean's search in a §1983 action. Second, Felean argues that Mrs. Senk's initial consent to enter the residence in order to telephone the daughter given to D. Calhoun amounts to a consent to search the residence nearly one hour later on the part of Felean. Finally, Felean submits that he is entitled to qualified immunity, arguing that no reasonable officer in his position would have known that what he was doing violated plaintiffs' constitutional rights.

None of the asserted arguments are meritorious. With regard to the collateral estoppel proposition, the court initially agrees with defendants that, pursuant to 28 U.S.C. §1738, a federal court faced with a §1983 claim

should give a guilty plea elicited in state criminal proceedings preclusive effect whenever the state courts would do so. *See Walker v. Schaeffer*, 854 F.2d 138, 142 (6th Cir. 1987); *O'Kelly v. Russell Township Board of Trustees*, 675 F.Supp. 389, 391 (N.D. Ohio 1987). However, we do not believe that the Ohio courts would bar a §1983 action based on a fourth amendment illegal search claim by a plaintiff who had earlier pled guilty to a crime based upon evidence revealed in the search. Such an individual would be barred from arguing that the evidence had been illegally obtained, but would not at the same time be precluded from seeking civil redress in a §1983 action for the constitutional deprivation stemming from the illegal entry and search. At least one Ohio court has specifically so held. *See State v. Durst*, 1989 WL 150797 at 2 (Ohio App. Montgomery Cty. Dec. 13, 1989) (unpublished, text in WESTLAW). Felean's position, in essence, is tantamount to an assertion that an individual whose confession is coerced by a beating and who later pleads guilty to the confessed crime is barred from suing the applicable officials for assault and battery or for the unconstitutional use of excessive force under §1983. We do not believe that any such rule of law would survive constitutional scrutiny.

Felean's second argument has several faults, and his reliance upon *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987), is misplaced. In that case, the Seventh Circuit held that, where an official is granted consent to enter the residence, finds incriminating material, exits for a brief moment, and returns, the first consent extends to the second entry, which is thus deemed lawful. *Id.*, 814 F.2d at 454. This holding does not apply to the facts herein. First,

there is a factual dispute as to whether P. Senk ever gave the consent to a police officer; as previously mentioned, she stated in her deposition testimony that the consent was only given to a paramedic. Second, the court in *Diaz* limited its holding to the situation where the officer *immediately* seeks aid from other officers and reenters.

> We emphasize that we have applied this doctrine of "consent once removed" only where the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers. We do not intend to suggest by our analysis that one consensual entry means that law enforcement agents may thereafter enter and exit a home at will.

Id., 814 F.2d at 454. Here, it is uncontroverted that the entry by Felean occurred approximately one hour after that of D. Calhoun. We believe that the "consent once removed" doctrine would be stretched beyond its constitutional limits if utilized in the manner urged by defendants here.

With regard to the qualified immunity argument, Felean does not contend that the constitutional right implicated herein, the fourth amendment "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" (or if consent is obtained), *Anderson*, 483 U.S. at 640, was not clearly established on the evening in question. The inquiry, thus, focuses upon whether the record contains evidence which, if accepted as true, supports the claim that Felean acted unreasonably (*i.e.*, that

the reasonable official in Felean's place would have known that the claimed misconduct violated the fourth amendment). The court believes that the record satisfactorily demonstrates that Felean's qualified immunity defense is overcome. While it is undisputed that probable cause existed, Felean's own testimony reveals that the circumstances were, in fact, not exigent (Felean Deposition at 102). Moreover, Felean cannot escape his obligation under the law to obtain a warrant merely by asserting that he "assumed" that the source of D. Calhoun's order to enter and take pictures stemmed from the consent of P. Senk. Certainly, the reasonable officer would have either ensured that such consent had been given or would have obtained a warrant during the trip to the police station to procure the camera. For these reasons, then, the court is constrained to deny the defense of qualified immunity with regard to Felean.

III. CONCLUSION

For the foregoing reasons, the motion for summary judgment filed by the six police officers in their individual capacities (Docket No. 93) is hereby denied.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE